95-1730 (1)

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTHROP GRUMMAN CORPORATION
AND NORM BUSSARD,
Petitioners,
v.
MICHAEL E. GREEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals had authority to create a federal common law rule that a private party's release of his right to bring a claim under the False Claims Act is invalid unless the United States has knowledge or consents, even though the False Claims Act is a comprehensive federal scheme that specifically addresses the question of settlement but does not include the rule that the Court of Appeals created.

2. Whether a settlement agreement between private parties that releases a federal cause of action implicates the sort of "uniquely federal interests" that are required to authorize a federal court to create federal common law that displaces otherwise applicable principles of state contract law.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding except those listed in the caption. Although the respondent nominally filed this action in the district court in the name of the United States, as required by 31 U.S.C. § 3730(b)(1), the United States elected not to intervene in the action pursuant to 31 U.S.C. § 3730(b)(2) and did not participate in the proceedings in either the district court or the Court of Appeals. Accordingly, the United States is not a party before this Court.

Petitioner Northrop Grumman Corporation, named as "Northrop Corporation, Inc." in the proceedings below, is a publicly traded corporation. Northrop currently has no parent corporation, nor does it have any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
A. Congress, By Enacting The False Claims Act, Preempted The Application Of Federal Common Law In The Area	7
1. This Court Has Made Clear That Federal Courts Do Not Have Authority To Create Federal Common Law Where Congress Has Comprehensively Legislated	7
2. The Court of Appeals' Analysis Is Fundamentally At Odds With This Court's Precedents Holding That If Congress Has Spoken On A Subject, There Is No Room For Federal Common Law	10
3. The Ninth Circuit's Analysis Conflicts With Holdings Of The Other Courts of Appeals	12
4. The Ninth Circuit's Creation Of A Rule That Claims Under The FCA May Not Be Waived Conflicts With This Court's Decision In *United States v. Mezzanatto*	15

B. The Court of Appeals Erred In Creating a Federal Common Law Of Releases Where There Is No "Uniquely Federal Interest" That Would Warrant Displacing Applicable State Law 17

1. This Court's Precedents Make Clear That The Power Of The Federal Courts To Displace State Law In Favor Of A Uniform, Federal Common Law Of Decision Is Narrowly Circumscribed 17

2. The Court of Appeals' Displacement of State Contract Law Conflicts With This Court's Clear Precedents 19

3. The Ninth Circuit's Analysis Conflicts With The Methodology Employed By The Third And Fifth Circuits 27

CONCLUSION 29

Appendix A 1a

Appendix B 26a

Appendix C 29a

Appendix D 37a

Appendix E 38a

TABLE OF AUTHORITIES

Cases

	Page
A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp., 63 F.3d 1454 (D.C. Cir. 1995)	12, 13, 14
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	19
Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996)	28
Boyle v. United Technologies Corp., 487 U.S. 500 (1988)	18, 20, 21, 24, 27
Burks v. Lasker, 441 U.S. 471 (1979)	17
Bush v. Lucas, 462 U.S. 367 (1983)	17
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)	7, 22
Davidson v, FDIC, 44 F.3d 246 (5th Cir. 1995)	27
De Sylva v. Ballentine, 351 U.S. 570 (1956)	18
Dice v. Akron, C. & Y.R. Co., 342 U.S. 359 (1952)	4, 12, 21, 24
Dimuzio v. RTC, 68 F.3d 777 (3d Cir. 1995)	14
DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank, 69 F.2d 1398 (8th Cir. 1995)	14
D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942)	13, 14, 15
Eastern Energy, Inc. v. Unico Oil & Gas, Inc., 861 F.2d 1379 (5th Cir. 1988)	27
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)	17

TABLE OF AUTHORITIES

CASES

	Page
FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992)	9
Fleming v. United States Postal Service, 27 F.3d 259 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 741 (1995)	28
Gamewell Manufacturing, Inc. v. HVAC Supply, Inc., 715 F.2d 112 (4th Cir. 1983)	28
Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942)	25
General Engineering Corp. v. Martin Marietta Alumina, 783 F.2d 352 (3d Cir. 1986)	27
Gess v. United States, 909 F.Supp. 1426 (M.D. Ala. 1995)	28
Hansen v. Shearson/American Express, Inc., 890 F. Supp. 416 (E.D. Pa. 1995)	28
Illinois v. Milwaukee, 406 U.S. 91 (1972)	20
In re Omni Video, Inc., 60 F.3d 230 (5th Cir. 1995)	27
John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993)	28
Kamen v. Kemper Fin'l Serv., Inc., 500 U.S. 90 (1991)	17, 18, 19, 25
Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986)	21
Martin v. Morgan Drive Away, Inc., 665 F.2d 598 (5th Cir. 1982)	27
Matsushita Elec. Industrial Co. v. Epstein, 116 S.Ct. 873 (1996)	25, 26

TABLE OF AUTHORITIES

CASES

	Page
Milwaukee v. Illinois, 451 U.S. 304 (1981)	7, 8, 11, 15, 17
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)	8, 11
Mortgages Inc. v. United States District Court, 934 F.2d 209 (9th Cir. 1991)	9, 10
Murphy v. FDIC, 61 F.3d 34 (D.C. Cir. 1995)	13, 14, 15
Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981)	*passim*
O'Melveny & Myers v. FDIC, 114 S.Ct. 2048 (1994)	*passim*
Pierce v. Atchison, T. & S.F. Ry. Co., 65 F.3d 562 (7th Cir. 1995)	28
Pulliam v. Allen, 466 U.S. 522 (1984)	18
RTC v. W.W. Development & Management, Inc., 73 F.3d 1298 (3d Cir. 1996)	14
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)	7, 9, 11
Texas Industries v. Radcliff Materials, Inc., 451 U.S. 630 (1981)	*passim*
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)	20
Tiernan v. Devoe, 923 F.2d 1024 (3d Cir. 1991)	27, 28
Town of Newton v. Rumery, 480 U.S. 386 (1987)	18
United States v. Kimbell Foods, 440 U.S. 715 (1979)	18, 20, 24
United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973)	18

TABLE OF AUTHORITIES

CASES

	Page
United States v. Mezzanatto, 115 S.Ct. 797 (1995)	5, 6, 15, 16
United States v. Standard Oil Co., 332 U.S. 301 (1947)	17, 21
United States v. Yazell, 382 U.S. 341 (1966)	19, 20
Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966)	18, 26
Wheeldin v. Wheeler, 373 U.S. 647 (1963)	17, 20
Statutes	
12 U.S.C. § 611, *et seq*	12
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1738	25
31 U.S.C. § 3729, *et seq.*	*passim*
42 U.S.C. § 1983	18
Rules	
Federal Rule of Criminal Procedure 11(e)(6)	16
Federal Rule of Evidence 401	16
Textbook	
Black's Law Dictionary (6th Ed. 1990)	3

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Northrop Grumman Corporation and Norman Bussard respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-25a) is reported at 59 F.3d 953. The order of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing en banc (App., *infra*, 37a) is unpublished. The order and the judgment of the district court granting petitioners' motion for summary judgment (App., *infra*, 26a-36a) are unpublished.

JURISDICTION

The Court of Appeals entered its judgment on July 12, 1995. App., *infra*, 1a. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on January 19, 1996.

App., *infra*, 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, is reprinted in its entirety in the Appendix to this Petition. App., *infra*, 38a-60a.

STATEMENT OF THE CASE

In 1986, respondent began employment as an investigator at petitioner Northrop Grumman Corporation's B-2 Division. In the course of his employment, he was involved in an internal investigation into whether Northrop had submitted false claims to the United States for costs associated with the procurement of "Automated Test Equipment" under Northrop's contract for the B-2 "Stealth Bomber." Shortly after respondent was terminated in October 1988, he filed an action for tortious discharge and breach of the implied covenant of good faith in the Superior Court of California. The gravamen of the action was respondent's allegation that he was terminated in retaliation for having reported to his superiors at Northrop "double charging" that he allegedly uncovered during the internal investigation. App., *infra*, 30a-31a.

On April 16, 1990, respondent, with the assistance of counsel, entered into a "Settlement Agreement and General Release," which the district court found to be "an unambiguous, integrated agreement in which he released all claims against Northrop [and] its employees" in exchange for $190,000. App., *infra*, 32a. The paragraph of the settlement agreement containing the general release provided as follows:

> Green does hereby release, acquit and forever discharge Northrop [and] its ... employees ... from any and all claims, expenses, debts, demands, costs, contracts, liabilities, rights to payment, obligations, actions and causes of action of every nature, under any theory under the law, whether common, constitutional, statutory or other of any jurisdiction, foreign or domestic whether known or unknown, whether in law or in equity, which he had or held, or has or holds, or may claim to have or to hold by reason of any and all matters from the beginning of time to the present, including, but not limited to, those actions arising out of or relating to the [tortious discharge] Action and/or Green's employment with and separation from Northrop.

Id. at 32a. The settlement agreement also expressly provided that the agreement "shall be construed in accordance with, and governed by, the laws of the State of California." C.A. Excerpts of Record 42.

After signing the release, respondent filed the present action for alleged violations of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, (the "FCA" or the "Act") against petitioner Northrop, petitioner Norm Bussard (a Northrop employee), and three other defendants. The FCA authorizes a private citizen, through the *qui tam*[1] provisions of the Act, to bring a civil action for himself and the United States for a violation of the statute. 31 U.S.C. § 3730(b)(1). Respondent alleged, as he did in the state court action, that Northrop submitted false claims to the government for costs associated with the procurement of Automated Test Equipment under the B-2 "Stealth Bomber" contract. The United States was served with the complaint as required by the Act, and, after conducting what the district court described as an "intensive investigation and study" of respondent's allegations, declined to exercise its statutory right under 31 U.S.C. § 3730(b)(2) to intervene in the action. App., *infra*, 32a-33a.

After the United States declined to intervene, petitioners moved for summary judgment on the ground that respondent's claims were barred by the release entered into in the state court action. (It was undisputed, both in the district court and in the Court of Appeals, that because the government was not a party to the state court settlement agreement, the release would not have barred the government from intervening. Indeed, it was undisputed that the release did not in any way prevent the government or any other *qui tam* relator from pursuing a separate FCA action, nor would it have prevented respondent from providing information to the government.) The district court granted petitioners' motion, holding that the release was valid and enforceable and that it barred respondent's claims. App., *infra*, 33a-35a.

The Court of Appeals for the Ninth Circuit reversed. App., *infra*, 1a-25a. The court assumed the correctness of the district court's finding that, by entering into the release as part of the settlement of the state court action, respondent had bargained away his right to bring a *qui tam* action. It nonetheless held that respondent's prefiling

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[1] The term "*qui tam*" literally means "who as well." *Black's Law Dictionary* 1251 (6th Ed. 1990).

release was unenforceable. *Id.* at 4a-5a & n.3. Although it acknowledged that the statute was silent on the subject of prefiling releases, the court held as a matter of "federal common law," that "prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." *Id.* at 24a.

The Court of Appeals first rejected petitioners' argument that because the FCA created a detailed and comprehensive federal statutory scheme, including provisions addressing settlements entered into *after* an FCA claim is filed, the court could not read into the Act a non-textual bar on *pre*filing releases, as respondent urged. App., *infra*, 7a-9a.[2] Instead, the court concluded that, although the FCA is detailed and comprehensive, Congress' silence on the particular subject of the validity of *pre*filing releases meant that the court could decide this question as a matter of federal common law. *Id.* at 8a-9a.

In reaching this conclusion, the court offered three reasons for distinguishing this Court's decision in *O'Melveny & Myers v. FDIC*, 114 S.Ct. 2048, 2054 (1994), which had held that federal courts should not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." First, the court stated that *O'Melveny* "did not purport to overrule" this Court's decision in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952), which the court interpreted as authorizing the creation of a federal common law of releases. App., *infra*, 9a-10a n.4. Second, the court concluded that because *O'Melveny* was based upon Supreme Court precedents that pre-dated Ninth Circuit authority on this issue, *O'Melveny* should not be read to undercut existing Ninth Circuit law. *Id.* On this basis, the court held that *O'Melveny* did not preclude the creation of a federal common law rule, even in the case of a comprehensive and detailed federal statute, where a state law rule "would conflict with specific policies of a comprehensive federal scheme." *Id.* Finally, the court concluded that *O'Melveny*'s "concern that courts will undercut a balance struck by Congress" was inapplicable here, because "unlike other contexts in

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[2]The FCA contains detailed provisions governing the filing, conduct, and settlement of private *qui tam* actions. App., *infra*, 38a-60a. As the Court of Appeals explained in detail, the specific provisions relating to settlement of a private *qui tam* action apply only *after* it is filed. App., *infra*, 7a-8a.

which formulating a federal common law rule would require courts to create enforcement mechanisms that Congress might not have intended, formulating a rule to assess the validity of a release merely involves protecting those rights that Congress *did* create." *Id.* (emphasis in original).

The court then applied a balancing test to determine whether the content of federal common law should be determined by incorporating state law (which the court acknowledged likely would have upheld the release) or by creating a new federal rule governing releases. The court declared that because the interest in settling disputes is "present in every case," the party seeking to uphold a release should be required to "advance some important interest in addition to the interest in settlement." App., *infra*, 12a-13a. The court also stated that applying state law to uphold a release would impair the federal interest in "uniformity" in that it might be possible for parties to use choice-of-law clauses in their settlement releases to select the state law most likely to uphold the release. *Id.* at 11a. Finally, the court concluded that upholding a prefiling release would conflict with the FCA's general policy of " 'increas[ing] incentives, financial and otherwise, for private individuals to bring suits' " under the FCA, *id.* at 14a-15a, and would increase the likelihood that the government would not learn about fraud allegations. *Id.* at 17a-21a. Based upon these policy concerns, the Ninth Circuit engrafted onto the FCA a "federal common rule" that prefiling releases, "when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." *Id.* at 24a. Applying this new common law rule, the court of appeals reversed the district court's judgment.

Petitioners petitioned for rehearing, and suggested rehearing en banc, on the ground that the Court of Appeals' decision conflicted with *O'Melveny* and with this Court's intervening decision in *United States v. Mezzanatto*, 115 S.Ct. 797, 801 (1995), which held that "absent some affirmative indication of Congress' intent to preclude waiver," the proper presumption is "that statutory provisions are subject to waiver by voluntary agreement of the parties." 115 S.Ct. at 801. On January 19, 1996, the Court of Appeals denied the petition and rejected petitioners' suggestion for rehearing en banc. App., *infra*, 37a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals held that it had the authority under "federal common law" to invalidate a state court settlement agreement to the extent that it released a claim under the FCA without the government's knowledge or consent. This holding is contrary to the decisions of this Court — and conflicts with decisions from other circuits — in at least two respects.

First, the fact that the FCA is a detailed and comprehensive statutory scheme that includes provisions concerning settlement of FCA claims precludes the federal courts, under this Court's decisions in *O'Melveny* and *Mezzanatto*, from imposing additional federal common law restrictions on the waiver of FCA claims. The Court of Appeals' contrary conclusion, which was based in part on the view that its pre-*O'Melveny* case law survived this Court's reversal of the Ninth Circuit in that case, also conflicts with the approach applied by the D.C. Circuit and the Third and Eighth Circuits. These circuits have correctly recognized that, when a federal statutory scheme is comprehensive and detailed, *O'Melveny* categorically prohibits a court from creating a federal common law rule of decision to cover matters that Congress chose not to address.

Second, even assuming *arguendo* that the language and structure of the FCA did not preempt the creation of a federal common law rule, the Court of Appeals erred. This Court's decisions make clear that the content of such a rule must be determined by incorporating state law, unless (at a minimum) application of the state rule implicates one of a very narrow range of "uniquely federal interests" such as admiralty, the authority and duties of the United States, and disputes among States or with foreign nations. The Court of Appeals disregarded this important and well-settled limitation on its federal common law power by failing to recognize that there is no "uniquely federal interest" in a private party's release of a federal cause of action. In particular, there was no uniquely federal interest here because the right of the federal government to bring an action under the FCA was in no way affected by the release. The Ninth Circuit's analysis also conflicts with decisions from the Third and Fifth Circuits, which have declined to displace state law in evaluating the validity of settlements precisely because there was no substantial federal interest.

In addition to the conflict with decisions of this Court and of other Courts of Appeals, there are other substantial reasons why review of

the decision below is warranted. For several years, the lower courts have been in disarray over the general question whether state law should be adopted as the federal rule of decision to govern the enforceability of settlement agreements releasing federal claims, and this case provides an appropriate vehicle for providing much-needed guidance on that issue.

Finally, the ruling below, in addition to usurping a decision that properly belongs to Congress, will make it significantly more difficult for federal contractors throughout the Ninth Circuit to reach conclusive settlements of employment disputes.

For all of these reasons, which are discussed in detail below, review by this Court is warranted.

A. Congress, By Enacting The False Claims Act, Preempted The Application Of Federal Common Law In The Area

1. This Court Has Made Clear That Federal Courts Do Not Have Authority To Create Federal Common Law Where Congress Has Comprehensively Legislated

"The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). In our federal system of separation of powers, which creates a "division of functions between the Congress and the federal judiciary," *id.* at 313, and accords to Congress the "exclusive province . . . to formulate legislative policies," *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978), "'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee v. Illinois*, 451 U.S. at 317.

Although the creation of federal common law by the courts may be a "necessary expedient" in some limited circumstances in the absence of legislation, this Court's precedents make clear that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Milwaukee v. Illinois*, 451 U.S. at 314. *See also Clearfield Trust Co. v. United States*, 318 U.S. 363, 367

(1943) (federal common law is resorted to only "[i]n the absence of an applicable Act of Congress"). Even in those few areas where the Court has traditionally created federal common law in the absence of legislation — such as disputes between States, which "frequently call for the application of a federal rule when Congress has not spoken," *Milwaukee v. Illinois*, 451 U.S. at 315, n.8, or admiralty law, *see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) — this Court has recognized that Congress is in a superior constitutional position than are the courts to enact the substantive federal law governing the dispute. Thus, where Congress has enacted comprehensive legislation in an area, the Court has held that Congress' "decision controls," to the exclusion of common law that pre-existed the statute or that might properly have been created by the federal courts in the absence of the statute. *Milwaukee v. Illinois*, 451 U.S. at 315, n.8. *See also Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) ("[t]he Court also has recognized a responsibility, *in the absence of legislation*, to fashion federal common law in cases raising issues of uniquely federal concern") (emphasis added). Accordingly, when a court, construing federal legislation and applying the traditional canons of statutory construction, determines that Congress has "sp[oken] directly to a question," the court's task is at an end; the court is not free to impose a supplemental or different rule than that provided for by Congress. *Mobil Oil*, 436 U.S. at 625. For purposes of precluding courts from creating federal common law in an area, the question is *not* whether Congress explicitly has proscribed the use of federal common law, but simply whether it has enacted detailed and comprehensive legislation. *Milwaukee v. Illinois*, 451 U.S. at 315.

Nor is it appropriate for courts to create federal common law simply because Congress has not answered the precise question of the availability of a particular right, remedy, or rule of decision. In *Mobil Oil*, for example, this Court held that federal courts were not free to fashion a federal common law rule of recovery in admiralty for "loss of society" where the federal legislation in the area, the Death on the High Seas Act, did not address that question. 436 U.S. at 625. The Court reasoned that Congress, in enacting the legislation, had prescribed specific rules on many aspects of recovery, including a limitations period, survival, contributory negligence, and damages. *Id* at 625-26. Because Congress had comprehensively prescribed procedures and remedies for claims under the Act, there simply was no

room for the courts to create additional law on the subject, even though admiralty is an area in which federal courts historically have fashioned common law in the absence of legislation. *Id.*; *see also Tennessee Valley Authority*, 437 U.S. at 194 (once Congress has "decided the order of priorities in a given area," the judicial role "comes to an end").

This Court recently applied these principles in *O'Melveny*, a case involving the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). In *O'Melveny*, the Ninth Circuit had held as a matter of federal common law that wrongful conduct that could have formed a defense against a bank in receivership would not be imputed to the FDIC as receiver. *FDIC v. O'Melveny & Myers*, 969 F.2d 744, 751-52 (9th Cir. 1992). This Court reversed, holding that there was no basis for displacing California law on that subject with judge-made federal law. *O'Melveny*, 114 S.Ct. at 2054. In light of the "comprehensive" provisions of FIRREA itself, including provisions specifically creating federal statutory rules of decision "regarding claims by, and defenses against, the FDIC as receiver," the Court refused to look beyond the terms of FIRREA to displace state law. *Id.* Courts should not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed" because "matters unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* Applying the canon "*[i]nclusio unius, exclusio alterius*," the Court looked to the specific statutory exceptions to the rule that the FDIC " 'steps into the shoes' of the failed S & L," and concluded that "[t]o create additional 'federal common law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* Under *O'Melveny* and this Court's other precedents, where Congress has enacted a detailed and comprehensive federal statutory scheme, the existence of that federal legislation displaces federal judicial power to create federal common law.

2. The Court Of Appeals' Analysis Is Fundamentally At Odds With This Court's Precedents Holding That If Congress Has Spoken On A Subject, There Is No Room For Federal Common Law

The Court of Appeals acknowledged — as it had no choice but to do[3] — that the FCA is a detailed and comprehensive federal statutory scheme. App., *infra*, at 7a-8a & 9a-10a n.4. It also recognized that the FCA contains several provisions specifically addressing the question of settlements of *qui tam* actions. *Id.* at 7a-8a. Conspicuously absent from this detailed statutory scheme, however, is *any* provision saying that settlement of a *qui tam* claim before an action is filed must be reported to the government in order to be valid. *Id.* at 7a (noting that the Act is "silent" on this subject). Nonetheless, and notwithstanding this Court's decision in *O'Melveny*, the Ninth Circuit held that federal common law is authorized if the court finds that a state rule "would conflict with specific policies of a comprehensive federal scheme." *Id.* at 10a n.4. The court went on to conduct an extensive balancing of what it perceived to be the relevant state and federal interests involved, and arrived at a rule of its own making invalidating general settlement agreements to the extent that they release a claim under the FCA "without the United States' knowledge or consent." *Id.* at 13a-24a. This conclusion is directly contrary to the Court's clear holding, in *O'Melveny* and other cases, that a "comprehensive and detailed" federal statute may not be supplemented by federal common law.

The court's holding appears to have been erroneously predicated upon a separate section of this Court's opinion in *O'Melveny* that discusses the applicable principles governing the use of federal common law in the *absence* of comprehensive regulation. App., *infra*, 10a n.4. (citing *O'Melveny*, 114 S.Ct. at 2055). In the cited part of the *O'Melveny* opinion, this Court discussed whether federal common law could be invoked "assuming the *inapplicability* of FIRREA" — an exercise that was necessary only because the events in question took place prior to the enactment of FIRREA and it was unclear whether

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[3] In *Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 213 (9th Cir. 1991), another panel of the Ninth Circuit had held unequivocally that the FCA is a "comprehensive legislative scheme" such that the court was precluded from supplementing the remedies provided for in the Act with federal common law rights of contribution and indemnity.

the statute was retroactive. 114 S.Ct. at 2055 (emphasis added). By contrast, the *first* part of the Court's *O'Melveny* opinion, discussed above, assumed the *applicability* of FIRREA, and makes clear that where a comprehensive federal statutory scheme does exist, a federal court may *not* engage in the balancing of policies called for by the "significant conflict" analysis that would apply in the absence of legislation. 114 S.Ct. at 2054-55.

Given the comprehensive nature of the FCA, the court should have recognized that additional federal common law on the matter of settlements was preempted. *O'Melveny*, 114 S.Ct. at 2054-55. The court's use of the "significant conflicts" test discussed in the second part of *O'Melveny* as a basis for adding to this statutory scheme a new "federal common law" rule that it thought balanced the relevant incentives more effectively than what was enacted by Congress flies in the face of *O'Melveny* and this Court's other precedents. *See Northwest Airlines*, 451 U.S. at 97; *Milwaukee v. Illinois*, 451 U.S. at 319; *Mobil Oil Corp.*, 436 U.S. at 625.

In its opinion, the Ninth Circuit purported to distinguish this Court's precedents as standing only for the narrow principle that where Congress has provided mechanisms for *enforcement* of a statute, the courts should not imply new causes of action or "additional remedies." App., *infra*, 8a-9a & 10a n.4. The court thought that this narrow principle would not be transgressed by a judicially-created rule that would "protec[t] those rights that Congress *did* create" by "prevent[ing] parties from releasing the remedy without first obtaining the government's consent." *Id.* (emphasis in original).

The Ninth Circuit's analysis disregards *O'Melveny*, which did *not* involve a proposed new cause of action or remedy, but rather a question of imputation of a defense. As *O'Melveny* makes clear, the principle that federal courts should not make "federal common law" to supplement a federal statutory scheme is *not* limited to the creation of new claims or remedies. This Court has limited the power to create federal common law to cases where there is an "absence of legislation," *Northwest Airlines*, 451 U.S. at 95, precisely because it is for *Congress* to effect the balancing of incentives that it believes proper in fulfilling the legislative function of "decid[ing] the order of priorities in a given area." *Tennessee Valley Authority*, 437 U.S. at 194. That fundamental limitation on the judicial function is *not*, as the Ninth Circuit thought, restricted to the question of remedies, *see O'Melveny*,

114 S.Ct. at 2054, nor is it suspended when the court thinks that a proposed rule of "federal common law" might further the policies that it thinks animate the federal statutory scheme.

The Ninth Circuit's further ground for distinguishing *O'Melveny, Northwest Airlines*, and this Court's other cases was that they did not "purport to overrule" *Dice v. Akron*, 342 U.S. 359 — a case that the court read as authorizing the creation of "federal common law" to assess "the validity of a release." App., *infra*, 9a-10a & n.4. But even assuming that *Dice* stands for that proposition (an erroneous assumption, as discussed below), the *most* that *Dice* could be read to have done is to require that a release of certain federal statutory rights be *voluntary* to be enforceable. *See Dice*, 342 U.S. at 362 ("a release of rights under the [Federal Employers' Liability] Act is void when the employee is induced to sign it by . . . deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release"). Accordingly, not even the Ninth Circuit's broad reading of *Dice* — and certainly nothing in this Court's other precedents — could support the creation of a "federal common law" rule of the fundamentally legislative character that the court adopted here.

3. The Ninth Circuit's Analysis Conflicts With Holdings Of The Other Courts of Appeals

The Ninth Circuit's erroneous reading of *O'Melveny* also places it in conflict with the District of Columbia Circuit and the Third and Eighth Circuits, which have held that where a comprehensive and detailed federal statutory scheme exists, any question involving the statute must be answered by the statute itself, or, in the case of a matter "unaddressed" by the statute, from state law.

In *A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454 (D.C. Cir. 1995), the District of Columbia Circuit considered the application of *O'Melveny* to the Edge Act, 12 U.S.C. § 611, *et seq.*, which provides certain standards of liability for international banking corporations. Having found that the Act did not address the specific question presented in the case, *i.e.*, the applicable statute of limitations in a claim brought under the Act, the court concluded that it had no power to create federal common law in the area. The court reasoned that, because the Edge Act is a detailed statutory scheme within the meaning of the first part of the *O'Melveny* decision, the court could not use the statute's silence on a particular issue as "an

invitation to the federal courts to conjure up a 'federal common law untethered to a genuinely identifiable (as opposed to a judicially constructed) federal policy.'" 62 F.3d at 1460 (quoting *O'Melveny*, 114 S.Ct. at 2055).

The D.C. Circuit reached a similar result in *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995), which addressed an area of federal common law that later was occupied by a detailed statutory scheme. The specific question in *Murphy* was whether the federal common law defense that this Court recognized in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (adopting a federal common law rule that the FDIC as receiver of a failed bank is not bound by an unwritten "side agreement" by the bank not to enforce a note), was eliminated when Congress enacted FIRREA, which comprehensively regulated the rights of the FDIC as receiver of a failed banking institution. The Court of Appeals held that the basis for this defense was eliminated, reasoning that, under the logic of *O'Melveny*, there simply was no room for federal common law in the context of FIRREA's detailed statutory scheme, including the pre-FIRREA federal common law defense created by *D'Oench, Duhme*. The court took the holding of *O'Melveny* to be that, because specific provisions of FIRREA recognize certain defenses to enforcement but not others, the possibility of other federal common law defenses necessarily was eliminated thereby under the doctrine "'*[i]nclusio unius, exclusio alterius.*'" 61 F.3d at 39 (quoting *O'Melveny*, 114 S.Ct. at 2054). The court concluded that the inclusion of specific defenses in the statute — including one that resembled but was not identical to the defense created in *D'Oench, Duhme* — "implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute — of which the *D'Oench* doctrine is one." 61 F.3d at 39.

Significantly, in neither *A.I. Trade* nor *Murphy* did the D.C. Circuit engage in the "significant conflicts" analysis set forth in the part of the *O'Melveny* opinion that applies to situations where no comprehensive legislation exists — the source of the Ninth Circuit's error in this case. Rather, in both cases the court did what *O'Melveny* instructs: it looked to the statute, found that the statute was a detailed and comprehensive expression by Congress of what federal law should exist in the relevant area, and concluded that there was no room for judicial lawmaking through the mechanism of "federal common law." *A.I. Trade*, 62 F.3d at 1459-60; *Murphy*, 61 F.3d at 39.

Two other Courts of Appeals have followed the D.C. Circuit's approach in *A.I. Trade* and *Murphy*. In *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank*, 69 F.3d 1398 (8th Cir. 1995), the Eighth Circuit agreed with the D.C. Circuit that where Congress has legislated in an area through a detailed statutory scheme, the first step of *O'Melveny* precludes any application of federal common law by way of a "conflicts" analysis of the sort employed by the Ninth Circuit here. *DiVall* was a declaratory relief action brought by the maker of a promissory note who sought to have the note declared invalid on the ground that it lacked consideration. The district court held that the FDIC (from which the holder had acquired the note) was a federal common law "holder in due course," despite contrary state law, and that it also was protected by the federal common law defense recognized in *D'Oench, Duhme*. The Eighth Circuit reversed, holding that under *O'Melveny*, the existence of a comprehensive statutory scheme such as FIRREA barred the courts from creating additional federal common law defenses in the same area. *DiVall*, 69 F.3d at 1402. The court declined to entertain any further considerations in favor of federal common law: "If [the holder's] defense is to be barred, it must be barred either by a specific provision of FIRREA or by state law." *Id.* at 1402-03. Like the D.C. Circuit, the Eighth Circuit did *not* engage in the "significant conflicts" analysis that *O'Melveny* and this Court's other precedents reserve for situations in which no federal legislation exists — and that the Ninth Circuit improperly employed here.

The Third Circuit also has followed the approach set forth in *O'Melveny* and applied by the D.C. Circuit and the Eighth Circuit. In *RTC v. W.W. Development & Management, Inc.*, 73 F.3d 1298, 1308 (3d Cir. 1996), the Third Circuit held that " 'matters left unaddressed' " in FIRREA " 'are presumably left subject to the disposition provided by state law' " under *O'Melveny*. Once again, the court did *not* engage in the "significant conflicts" analysis that *O'Melveny* said applies only in the absence of a comprehensive statute. *See also Dimuzio v. RTC*, 68 F.3d 777, 780 n.2 (3d Cir. 1995) (suggesting that *D'Oench, Duhme* defense may no longer be available, citing *O'Melveny* and *Murphy*).

Even apart from the conflict discussed above, the Ninth Circuit is in conflict with the D.C. Circuit on a related question as well: the effect of comprehensive legislation on a previously existing federal common law rule. In its opinion here, the Ninth Circuit purported to

distinguish *O'Melveny* on the ground that federal common law rules governing releases have existed for some time, App., *infra*, 9a-10a & n.4 (citing *Dice*), and that nothing in *O'Melveny* specifically indicated an intention to change that rule, *id.* The D.C. Circuit in *Murphy* rejected a nearly identical argument that *O'Melveny* prohibited only the creation of new common law, and that because it did not specifically mention *D'Oench, Duhme*, the federal common law rule recognized in that case was unaffected. 61 F.3d at 40. The D.C. Circuit reasoned that this view directly contradicted this Court's precedents regarding "the impact of comprehensive new legislation upon existing federal common law." *Id.* (citing *Milwaukee v. Illinois*, 451 U.S. at 314-15). The court concluded that, under *O'Melveny* and *Milwaukee v. Illinois*, a court may *not* rely upon pre-existing federal common law to supplement a later-enacted federal statutory scheme. Rather, because Congress has legislated in the area, "'the need for such an unusual exercise of lawmaking by federal courts disappears.'" 61 F.3d at 40 (quoting *Milwaukee v. Illinois*, 451 U.S. at 314).

The Ninth Circuit's reasoning here conflicts directly with the D.C. Circuit's analysis in *Murphy*. Here, the Ninth Circuit looked to *Dice*, a case decided long before the modern FCA, as a source of federal common law to invalidate a release of an FCA claim. But however *Dice* may be understood where there is no comprehensive federal statute, a question discussed below, here Congress has enacted a detailed and comprehensive statutory scheme that *specifically addresses the question of settlements. See supra* note 2. As the D.C. Circuit recognized in *Murphy*, the competence of the judiciary to fashion a federal rule in a given area simply disappears when Congress has addressed the subject so comprehensively. 61 F.3d at 39.

4. The Ninth Circuit's Creation Of A Rule That Claims Under The FCA May Not Be Waived Conflicts With This Court's Decision In *United States v. Mezzanatto*

Even apart from this Court's decision in *O'Melveny*, the Ninth Circuit's approach was flawed. The court's use of federal common law to fill a perceived "gap" in the FCA overlooks the fact that the answer to the court's question was readily available by reference to the statute itself. In construing a statute, the court should apply any pertinent canon of statutory construction to help determine the meaning of the text as well as the significance, if any, of Congress' failure to address a particular issue. Here, the Court of Appeals failed to apply the well-

established background principle of construction that federal statutory rights are presumed waivable, explained most recently in this Court's decision in *Mezzanatto*, 115 S. Ct. at 801.

In *Mezzanatto*, the question was whether rights under Federal Rule of Evidence 401 and Federal Rule of Criminal Procedure 11(e)(6) could be waived. 115 S.Ct. at 800. Neither rule spoke directly to the subject, and the Ninth Circuit determined that to permit a waiver in light of Congress' silence would require the court " 'to write in a waiver in a waiverless rule.' " *Id.* at 801 (citation omitted). This Court reversed, holding that "[t]he Ninth Circuit's analysis is directly contrary to the approach we have taken in the context of a broad array of constitutional and statutory provisions," which is that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Id.*

The presumption that all federal statutory rights may be waived unless Congress directs otherwise is a background rule of construction against which all federal statutes must be read. *Mezzanatto*, 115 S.Ct. at 803. Accordingly, when a statute is "silent" as to the waivability of a particular right, as the Ninth Circuit found to be the case here, App., *infra*, 7a, the proper interpretation of that silence is that the statutory rights in question "are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 115 S.Ct. at 803.

It is undisputed that the release in question here affects only respondent's own rights and in no way affects the right of the United States government or any other *qui tam* relator to bring claims against petitioners under the FCA. Under *Mezzanatto* and the long line of cases that it follows, respondent's own right to bring a claim against petitioners under the FCA and to recover proceeds from such a claim was subject to voluntary waiver by virtue of the background rule that in the absence of an express statement to the contrary, a federal statute conferring rights is presumed to permit waiver of those rights. The Ninth Circuit's contrary presumption that Congress' "failure to resolve the question expressly" may be read as a "desire to leave resolution of the issue to the courts," App., *infra*, 9a, is flatly contrary to this Court's clear precedents. *Mezzanatto*, 115 S.Ct. at 801.

B. The Court of Appeals Erred In Creating A Federal Common Law Of Releases Where There Is No "Uniquely Federal Interest" That Would Warrant Displacing Applicable State Law

1. This Court's Precedents Make Clear That The Power Of The Federal Courts To Displace State Law In Favor Of A Uniform, Federal Common Law Of Decision Is Narrowly Circumscribed

It is well-settled that "'[t]here is no federal general common law.'" *O'Melveny*, 114 S.Ct. at 2053 (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines*, 451 U.S. at 95. Thus, where a rule of decision is needed and the answer is not provided by a federal statute, federal courts generally are not free to fashion their own common law rules. Rather, because Congress is presumed to legislate "'against the background of the total *corpus juris* of the states,'" *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (quoting Hart & Wechsler, The Federal Courts and the Federal System 435 (1953)); *see also Burks v. Lasker*, 441 U.S. 471, 478 (1979), state law presumptively fills the interstices of a federal statutory scheme and also presumptively governs in the absence of federal legislation. *O'Melveny*, 114 S.Ct. at 2054; *Kamen v. Kemper Fin'l Serv., Inc.*, 500 U.S. 90, 98 (1991).

Moreover, because "the federal lawmaking power is vested in the legislative, not the judicial, branch of government," *Northwest Airlines*, 451 U.S. at 95, it is for Congress, not the courts, to decide when and to what extent "latent federal power should be exercised to displace state law." *Wallis*, 384 U.S. at 68. This principle reflects a judgment not only about the appropriate separation of powers, see *Milwaukee v. Illinois*, 451 U.S. 304 at 312-13; *see also United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947), but also about the relative competence of federal courts to make the sort of determinations required, *see, e.g., Bush v. Lucas*, 462 U.S. 367, 390 (1983); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981).

Accordingly, the power of federal courts to displace state law with judge-made "federal common law" is sharply circumscribed and is warranted only in "extraordinary cases." *O'Melveny*, 114 S.Ct. at 2056; *see also Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (noting that such cases are "'few and restricted'"). Of course, where Con-

gress or the Constitution affirmatively has prescribed controlling federal standards, federal courts are empowered to give meaning to those standards through "a process of case-by-case judicial decision in the common law tradition," — and to set aside contrary state law in doing so. *Northwest Airlines*, 451 U.S. at 95.[4] But except where "Congress has given the courts the power to develop substantive law," a federal court may not displace a nondiscriminatory[5] state law in favor of a judge-made federal rule unless application of the state rule implicates "uniquely federal interests" *and* would significantly conflict with an specific, concrete federal policy that reflects those interests. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-08 (1988); *see also O'Melveny*, 114 S.Ct. at 2055; *Texas Industries*, 451 U.S. at 640; *Wallis*, 384 U.S. at 68.

These limitations on the power of a federal court to set aside state law in favor of a judge-made federal rule apply with full force where state law operates to fill the interstices of a federal scheme. Even in an area of law that has been described as "necessarily federal in character," *Kamen*, 500 U.S. at 97, or "entirely governed by federal law," *Boyle*, 487 U.S. at 507 n.3, the "common law" interstices of that federal law will be determined by borrowing or incorporating state law "except where a significant conflict with federal policy exists." *Id.*; *see*

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[4] As explained earlier, the rules of law contained in a federal statute must be construed in light of the applicable *federal* canons of construction and background principles of law. Thus, for example, this Court has consistently held that the scope of 42 U.S.C. § 1983 must be construed in light of the background principles of common law against which it was enacted. *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Pulliam v. Allen*, 466 U.S. 522, 529-36 (1984). Once the task of statutory construction is completed, however, and the affirmative scope of the statute has been delineated, state law fills the remaining interstices.

[5] The presumption that Congress legislates with the expectation that its laws will be construed against the *corpus juris* of the States would not, of course, apply to a state law that facially discriminates against federal interests, *see, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-96 (1973), or to "aberrant" laws that define a particular term " 'in a way entirely strange to those familiar with its ordinary usage.' " *Id.* (quoting *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956)); *see also United States v. Kimbell Foods*, 440 U.S. 715, 736 n.37 (1979). Of course, this exception is inapplicable here because the state law at issue involves contract principles of "general applicability." *Id.*

also O'Melveny, 114 S.Ct. at 2053-54; *Kamen*, 500 U.S. at 98; *United States v. Yazell*, 382 U.S. 341, 352 (1966).

2. The Court Of Appeals' Displacement of State Contract Law Conflicts With This Court's Clear Precedents

The Court of Appeals departed from these settled principles in two critical respects. First, the court ignored the preliminary issue whether "uniquely federal interests" are implicated by the validity of a global agreement that releases both state and federal claims. Second, as a consequence of its failure to identify the uniquely federal interest at stake, the court failed to recognize that state law may be displaced only if it presents a significant conflict with a specific, concrete federal policy that reflects such an interest. Under the applicable standards set forth in this Court's decisions, no such uniquely federal interest exists in private contracts settling federal statutory claims — contracts that, like all other private agreements, are presumptively governed by state law.

By failing to consider — much less identify — whether any "uniquely federal interest" was at stake, the Ninth Circuit circumvented the primary constraint established by this Court against "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny*, 114 S.Ct. at 2055. That is, the elimination of the threshold requirement of a uniquely federal interest would permit federal judges to displace state law whenever they are of the view that it would conflict with a judicially perceived "policy" embodied in a federal statute — precisely what the Ninth Circuit did in this case.

As noted earlier, this Court has made clear that judicial authority to displace state law with a federal rule of decision exists only in two limited circumstances: where "Congress has given the courts the power to develop substantive law" and where "a federal rule of decision is 'necessary to protect uniquely federal interests.' " *Texas Industries*, 451 U.S. at 640 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). The first of these categories is, of course, inapplicable here; no one in this case has contended (or could contend) that Congress, in enacting the FCA, has affirmatively conferred a common-law authority to prescribe substantive law. *Cf. Texas Industries*, 451 U.S. at 642-43 ("this Court has read § 301(a) of the Labor Management Relations Act . . . as vesting in the courts the power to develop a common law of labor-management relations")

(citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)). Accordingly, the identification of a "uniquely federal interest" was a "necessary . . . condition for the displacement of state law" in this case. *Boyle*, 487 U.S. at 507; *Texas Industries*, 451 U.S. at 640; *Northwest Airlines*, 451 U.S. at 95; *Yazell*, 382 U.S. at 352. The Ninth Circuit committed a clear and categorical error by failing to identify a uniquely federal interest that was implicated in this case.[6]

Moreover, it is clear that no such interest can be identified here. The range of interests that are sufficiently important to warrant judicial creation of federal substantive law without congressional authorization are "few and restricted." *Wheeldin*, 373 U.S. at 651. This Court, in *Texas Industries*, summarized the limited areas in which federal common law controls as follows:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, *either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.*

Texas Industries, 451 U.S. at 641 (emphasis added; footnotes and citations omitted); *see also Northwest Airlines*, 451 U.S. at 95; *Illinois v. Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (federal common law

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[6] The Ninth Circuit seemed to think that this Court's decision in *Kimbell Foods, supra*, established a "three-part test" in which the most important factor was " 'whether application of state law would frustrate specific objectives of the federal program.' " App., *infra*, 9a-11a (quoting *Kimbell Foods*, 440 U.S. at 728-29). However, as this Court made clear in *Boyle*, *Kimbell Foods* did not establish a different standard, despite its different choice of language: A state law " 'frustrates specific objectives' of federal legislation" only if it "significant[ly] conflict[s]" with an "identifiable federal policy or interest." 487 U.S. at 507 (quoting *Kimbell Foods*, 440 U.S. at 728; other citations and internal quotation marks omitted). Moreover, *Boyle* makes clear that, in addition to this showing, it is a "necessary . . . condition for the displacement of state law" that there be a "uniquely federal interest" implicated by the state law. *Id.*

applies "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism"); *Standard Oil Co.*, 332 U.S. at 307 (federal common law applies to those matters "so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition").[7]

Although the Court of Appeals erred by failing explicitly to address the question whether there was a "uniquely federal interest" at issue in this case, its opinion can be read implicitly to suggest that the release of a federal cause of action is a sufficiently important federal interest to warrant displacement of any state law that a federal court concludes "would frustrate the policies underlying" that cause of action. App., *infra*, 11a. Thus, after first asserting that " '[f]ederal law always governs the validity of releases of federal causes of action,' " *id.* at 9a (quoting *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986) (citing *Dice v. Akron*, 342 U.S. at 361)), the court declared in a footnote that "under our decision in *Mardan*, federal common law *ordinarily* would displace state law" on this subject. App., *infra*, 10a n.4 (emphasis added).[8] The court argued that what it termed *O'Melveny*'s "*dicta*" concerning the interstitial use of state law was inapplicable here because, where the release of a federal claim is at issue, "the potential that state law might impair federal rights is substantial." *Id.* at 10a n.4 (citing *Dice*, 342 U.S. at 361).

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[7] Consistent with *Texas Industries*, the Court also has held that state laws imposing liability on a party for complying with the terms of a federal procurement contract also implicate "uniquely federal interests." *Boyle*, 487 U.S. at 504-07 (holding that state laws imposing "civil liabilities arising out of the performance of federal procurement contracts" implicate a "uniquely federal interest"); *O'Melveny*, 114 S.Ct. at 2055 (laws that "govern the primary conduct of . . . [government] contractors"). *Boyle* falls squarely within *Texas Industries*' general rule: State regulation of contract specifications that have been approved by the Federal Government plainly implicates "the authority and duties of the United States as sovereign." *Texas Industries*, 451 U.S. at 641.

[8] Although the court stated that this conclusion was required "under our decision in *Mardan*," it more closely resembles the views of the dissenting judge in *Mardan* (who was a member of the panel in this case): "At the very least, the fact that federal law governs here creates a presumption against incorporation of state law in the absence of convincing justification." 804 F.2d at 1463 (Reinhardt, J., dissenting).

To the extent that the Ninth Circuit's opinion can be read to suggest that a settlement agreement releasing a federal claim is a "uniquely federal interest," the court plainly erred. A release of a federal claim in a contract between private parties — particularly one that settles both state and federal claims in a *state* court action — hardly can be said to involve "the authority and duties of the United States as sovereign" or a controversy of an "interstate or international nature." *Texas Industries*, 451 U.S. at 641. In this respect, it is important to recognize that the legal rights of the United States are in no way infringed or compromised by a *prefiling* settlement. *Cf. id.* (noting that there is a "uniquely federal interes[t]" in "the rights and obligations of the United States"); *Clearfield Trust*, 318 U.S. at 366-67. In the prefiling context, the government is not bound by the employee's release of a *qui tam* claim because the employee is in no sense acting on the government's behalf.

Because the legal rights of the Government are not affected by the prefiling release of a *qui tam* claim, any assertion that a "uniquely federal interest" exists in a private settlement contract must be based on the more general interest in advancing the purposes of the federal statutory scheme that conferred the federal cause of action. That appears to have been the approach implicitly adopted by the Ninth Circuit in this case: The court purported to distinguish *Texas Industries* on the ground that judicial creation of federal rules governing releases of federal claims would not require the court to "engage in a task more appropriately left for the legislature" because "formulating a rule to assess the validity of a release merely involves protecting those rights that Congress *did* create." App., *infra*, 10a n.4 (emphasis in original). This argument, however, is squarely foreclosed by *Texas Industries* itself, in which the Court declined to create a federal common law right to contribution among joint antitrust violators because it concluded that the general interest in enforcing a federal statute is not the sort of "uniquely federal interest" that warrants the creation of new judge-made federal law:

> Admittedly, there is a federal interest in the sense that vindication of rights arising out of these congressional enactments supplements federal enforcement and fulfills the objects of the statutory scheme. Notwithstanding that nexus, contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in

> the absence of statutory authority. In short, contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law.

Texas Industries, 451 U.S. at 642 (citation omitted).

Moreover, it is apparent that the Ninth Circuit's creation of new federal law that it believed would further the purposes of the statutory scheme implicates precisely the sort of concerns identified in *Texas Industries* about judicial usurpation of the legislative function. The court's decision to bar prefiling releases absent the government's consent rests not only on highly debatable policy judgments[9] but also on dubious factual suppositions.[10] The decision whether to set aside state law, which otherwise would govern such releases, rests with Congress.

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[9]For example, the court erroneously discounted the value of prefiling settlements by asserting that the FCA's "concer[n] with deterring frivolous suits" is "not implicated when the relator chooses not to file." App., *infra*, 17a. That gets it exactly backwards: Where the relator chooses not to file a frivolous suit because of a prefiling settlement, the agreement has *accomplished* the statutory purpose of "deterring frivolous suits."

The court also erred in requiring petitioners to articulate some interest *other* than finality that is served by global settlement agreements. App., *infra*, 12a-13a. The court based this requirement on the view that, because the interest in finality is present in every case involving a settlement, a tie-breaker is needed when there is a substantial interest favoring nonenforcement. *Id.* But there is no reason, either in law or logic, why interests must be weighed ordinally ("two interests versus one interest"), and no reason why ties must go against enforcement merely because that weighty interest is present in every case.

Similarly erroneous is the court's conclusion that the FCA's policy of encouraging *qui tam* actions continues to exist even where (as here) the allegations have been publicly disclosed in state court litigation. App., *infra*, 18a-20a & n.11. The court reasoned that, in such cases, the statutory purpose of notifying the government has not necessarily been accomplished, but Congress apparently saw the matter differently: Allegations that have been publicly disclosed generally may not be the basis of a *qui tam* action by anyone other than the original source, regardless of whether the government can be shown not to have been aware of the information. 31 U.S.C. § 3730(e)(4)(A).

[10]For example, the sheer volume of *qui tam* cases that have been filed belies the court's assertion that failing to ban prefiling releases will make it impossible to "ensure that potential relators remain." App., *infra*, 21a.

(Footnote continued)

To the extent that the Ninth Circuit suggested that this Court's decision in *Dice* authorized it to fashion a new federal common law rule, *see* App., *infra*, 9a-10a & n.4, the court erred again. *Dice* merely established that the validity of a release of a federal statutory right is ultimately a federal question as to which "[s]tate laws are not controlling." 342 U.S. at 361. But as this Court recently reiterated in *O'Melveny*, it is essentially irrelevant whether "federal" law nominally governs, because the controlling analysis is unchanged:

> [K]nowing whether 'federal law governs' in the *Kimbell Foods* sense — a sense which includes federal adoption of state-law rules — does not much advance the ball. The issue . . . is whether the California rule of decision is to be applied to the issue [at hand] or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is California's own sovereign power or federal adoption of California's disposition.

O'Melveny, 114 S.Ct. at 2053-54 (emphasis in original; citations omitted); *see also Boyle*, 487 U.S. at 507 n.3.

Furthermore, although state law was displaced in *Dice*, it was for reasons that have no application to the instant case. In Dice, the Court refused to apply an aberrant Ohio state law, not because there was a "uniquely federal interest," but because Congress' whole purpose in enacting the Federal Employers' Liability Act was to create a body of law that would have "uniform application throughout the country"; in fashioning that uniform federal rule, the Court adopted the majority rule applied in most States rather than the Ohio rule. 342 U.S. at 361-

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The court similarly erred in predicting that its ruling invalidating the global settlement agreement in this case "will not disrupt commercial relationships that are predicated on state law." App., *infra*, 11a. On the contrary, the Ninth Circuit's ruling in this case will make it very difficult to obtain conclusive settlements of liability in employment disputes with current or former employees: Because it is not uncommon for disgruntled employees to make frivolous allegations of company misconduct for use as a bargaining chip during settlement negotiations, the only way in which the company could be sure it would get the full release it is bargaining for is to transmit all such agreements to the Department of Justice for its review and approval — a "filing requirement" that would create a colossal financial and economic burden both for the private interests involved and for the government.

62.[11] Accordingly, *Dice* falls within the second class of cases in which, under *Texas Industries*, a federal court may create new federal rules of decision, namely "those in which Congress has given the courts the power to develop substantive law." *Texas Industries*, 451 U.S. at 640. As noted earlier, *see supra* at 19-20, this case does not fall within this latter class.

No other "uniquely federal interest" appears to be implicated by the private settlement agreement that was entered into by the parties in this case. Indeed, quite the opposite is true: This Court has held that "[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98. That principle has especial force in this case, because the contract at issue here was a global settlement agreement that resolved a pending *state* court action. *Cf. Matsushita Elec. Industrial Co. v. Epstein*, 116 S.Ct. 873, 881-82 (1996) (a state court has the authority to approve a global settlement in a state court action, even if the settlement resolves federal claims that are within the exclusive jurisdiction of the federal courts).[12]

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[11] That this is the correct reading of *Dice* is confirmed by the *Dice* Court's citation of a Jones Act case, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942), in which the Court employed identical reasoning in refusing to apply a Pennsylvania state law regulating the burden of proof with respect to disputes over the validity of a release. *See Dice*, 342 U.S. at 361. At the cited page of *Garrett*, the Court stated as follows:

> This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.' The Act is based upon and incorporates by reference the Federal Employers' Liability Act, which also requires uniform interpretation. This uniformity extends to the type of proof necessary for judgment.

Garrett, 317 U.S. at 244 (citations omitted).

[12] Because *Matsushita* was not decided until after the Court of Appeals had already denied petitioner's petition for rehearing, it was not called to the attention of that court. We note, however, that it provides an alternative basis for concluding that the Ninth Circuit erred in this case. Because respondent's state and federal claims were all resolved in a pending state court proceeding, it follows that — unless the FCA has "impliedly repealed" the Full Faith and Credit Act, 28 U.S.C. § 1738 — the judgment of dismissal in the state court following the release of the federal claims must be given preclusive effect if a California court would accord preclusive effect to the judgment. 116 S.Ct. at

The Ninth Circuit's failure to identify which of the narrow class of "uniquely federal interests" was implicated in this case also caused it to make a second, closely related error. By omitting this crucial first step, and instead proceeding directly to the question whether state law conflicts with "federal policy," the Ninth Circuit ended up relying on the sort of "highly abstract" notions of policy that this Court has held are insufficient to serve as a basis for displacing otherwise applicable state law. *Wallis*, 384 U.S. at 70-71. By failing to require that the "federal policy" at issue be one that is rooted in, and reflects, one of the small class of "uniquely federal interests," the court was able to rely on highly vague notions of federal policy.

For example, the Ninth Circuit stated that applying California law to determine the validity of the settlement agreement would be contrary to the federal interest in "uniformity." App., *infra*, 11a. The court did not purport to tie this interest in uniformity to any "specific, concrete federal policy" of the FCA, *cf. O'Melveny*, 114 S. Ct. at 2055; rather, it simply declared that uniformity "is necessary to prevent parties, through use of choice-of-law clauses, from selecting as governing law the law of a state that is most likely to uphold the release." *Id.* This is, however, a classic bootstrapping argument: There is a need for "uniformity" to prevent such contractual choice of law only if one has first concluded that there is a policy *against* upholding releases. Moreover, this Court in *O'Melveny* dismissed such facile reliance on "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity," noting that if it so easily qualified as an identifiable federal interest, "we would be awash in 'federal common-law rules.' " 114 S.Ct. at 2055 (citation omitted).

Similarly, the Ninth Circuit erred by concluding that upholding the release would conflict with the FCA's general policy of " 'increas[ing] incentives, financial and otherwise, for private individuals to bring suits' " under the FCA. App., *infra*, 14a-15a (quoting S.Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267). In *O'Melveny*, this Court specifically rejected reliance on such generalized notions that state law "would 'disservice the federal program.' " 114 S.Ct. at 2055 (citation omitted); *see also Texas Industries*, 451 U.S. at 642.

878-84. Petitioner respectfully submits that it would not be inappropriate, as an alternative disposition of this case, for this Court to grant the petition, vacate the Ninth Circuit's judgment, and remand for reconsideration in light of *Matsushita*.

3. The Ninth Circuit's Analysis Conflicts With The Methodology Employed By The Third And Fifth Circuits

Apart from being inconsistent with controlling authority from this Court, the Ninth Circuit's analysis in this case conflicts with that employed in the Fifth Circuit and the Third Circuit. In several cases, these circuits have declined to displace state law in evaluating the validity of settlements precisely because there was not the required substantial federal interest. Thus, for example, in *In re Omni Video, Inc.*, 60 F.3d 230, 231-32 (5th Cir. 1995), the Fifth Circuit declined to displace state law in judging the validity of a settlement agreement, despite the fact that the agreement resolved rights under federal bankruptcy law, because the court "perceive[d] no strong federal interest in the issue of the validity of settlements entered into to resolve a bankruptcy suit." *See also Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 604-05 & n.5 (5th Cir. 1982) (because there was no "uniquely federal interes[t]" in the law governing permissible assignments of federal antitrust claims, state law governs the validity of such an assignment); *Eastern Energy, Inc. v. Unico Oil & Gas, Inc.*, 861 F.2d 1379, 1380 (5th Cir. 1988) (validity of global settlement agreement, pursuant to which federal RICO action was dismissed, is governed by state law); *cf. Davidson v. FDIC*, 44 F.3d 246, 250-52 (5th Cir. 1995) (refusing to create federal common law because such rules "should displace state laws only in the case of a significant conflict with specific or unique federal interests").

Similarly, in *Tiernan v. Devoe*, 923 F.2d 1024 (3d Cir. 1991), the Third Circuit quoted *Boyle's* reference to "uniquely federal interest[s]" to support its view that the creation of federal common law is authorized only "where strong federal interests are involved." *Id.* at 1032 (citation and internal quotation marks omitted). Applying this standard, the court found "no substantial federal interest" implicated by the question of the scope of an attorney's authority to conclude a global settlement, and the validity of the settlement was therefore judged under state law. *Id.* at 1033; *cf. General Engineering Corp. v. Martin Marietta Alumina*, 783 F.2d 352, 356-57 (3d Cir. 1986) (state law may be displaced only pursuant to express authority or "where strong federal interests are involved, as in cases concerning the rights and obligations of the United States"; accordingly, state law applied to the interpretation of a forum selection clause in a commercial contract).

The Third Circuit in *Tiernan* specifically held that applying a special federal rule of decision to the settlement of federal claims "would eviscerate any agreement in which the litigants sought settlement of all their claims." 783 F.2d at 1033. The Ninth Circuit's decision, by contrast, accomplishes precisely that sort of evisceration in the context of the global agreement at issue in this case.

More generally, this case provides an appropriate vehicle for providing much-needed guidance on the broader question "whether state law should be adopted as the federal rule of decision to govern the enforceability of settlement agreements" that cover federal claims — a "vexed one upon which a welter of cases have reached divergent if not flatly inconsistent results." *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.*, 715 F.2d 112, 113-14 (4th Cir. 1983). Courts have addressed this general question in cases involving claims arising under a variety of statutes and have reached conflicting results. *See, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1465-67 (4th Cir. 1996) (Age Discrimination in Employment Act); *Pierce v. Atchison, T. & S.F. Ry. Co.*, 65 F.3d 562, 570 (7th Cir. 1995) (ADEA) (collecting cases); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993) (CERCLA) (collecting cases); *Gess v. United States*, 909 F.Supp. 1426, 1446-47 (M.D. Ala. 1995) (Federal Tort Claims Act) (collecting cases); *see also Fleming v. United States Postal Service*, 27 F.3d 259, 260-61 (7th Cir. 1994) (noting that the law has been unsettled, even within the Seventh Circuit, on the question of what law governs settlements of federal claims), *cert. denied*, 115 S.Ct. 741 (1995); *Hansen v. Shearson/American Express, Inc.*, 890 F. Supp. 416, 427 (E.D. Pa. 1995) (noting that "there has been some division among the courts of appeals on the issue of when releases of federal claims are governed by a uniform, federal standard, and when the federal standard should be determined by reference to state law"). In particular, by making clear that a private agreement settling a federal claim simply does not implicate "uniquely federal interests," this Court could resolve all of these conflicts in this one case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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